Supreme Court, U.S.
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In The

Supreme Court of the United States

NICHOLAS CODY TATE,

Petitioner,

v.

STEVE UPTON, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Whether the Supreme Court of Georgia's failure to review the proportionality of Mr. Tate's death sentence in the manner required by Georgia's death penalty statute, and relied upon by this Court in allowing Georgia to resume the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Zant v. Stephens*, 462 U.S. 862 (1983), has allowed the imposition of an arbitrary and capricious sentence in violation of Mr. Tate's rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

NICHOLAS CODY TATE petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The decision of the Supreme Court of Georgia, 287 Ga. 364, 695 S.E.2d 591 (2010), affirming Mr. Tate's convictions and death sentence, appears as Appendix 1 to this petition. The denial of Petitioner's Motion for Reconsideration appears as Appendix 2 to this petition.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on June 1, 2010. A timely filed motion for reconsideration was denied on June 28, 2010. On September 16, 2010, Justice Clarence Thomas granted the application for an extension of time within which to file a petition for a writ of certiorari, making the petition due on or before November 25, 2010. Mr. Tate invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in relevant part: "No person . . . shall be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. art. V.

Amendment VI to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. art. VI.

Amendment VIII to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. art. VIII.

Amendment XIV to the United States Constitution, section 1, provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. art. XIV, cl. 1.

The relevant section of Georgia's death penalty statute. O.C.G.A. § 17-10-35, provides:

> (a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. . . .
>
> . . .
>
> (c) With regard to the sentence, the court shall determine:
>
> > (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> . . .
>
> > (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> . . . .
>
> (e) The court shall include in its decision a reference to those similar cases which it took into consideration. . . .

STATEMENT OF THE CASE

This case arose from crimes committed in rural Paulding County, Georgia, in 2001, at the home of Chrissie and Barry Williams. There was no jury

verdict in this case: in separate proceedings, brothers Nicholas, Dustin and Chad Tate all pled guilty to charges of murdering Chrissie Williams and her three-year-old daughter Katelyn. As part of their plea agreements, Dustin and Chad Tate were sentenced to life with the possibility of parole. Petitioner Nicholas Tate pled guilty without an agreement. He then waived a jury trial on sentencing and received a death sentence following a bench trial.

At the time of the crime, Petitioner knew the Williamses. Chrissie Williams' sister was married to the Tate brothers' elder brother, and Barry Williams was a methamphetamine dealer who had sold drugs to Nicholas Tate. Nicholas Tate was 21-years-old at the time of the crime, Dustin Tate was 18, and Chad Tate was 15-years-old.

The evidence from statements given by the Tate brothers was that the Tates went to the Williams home believing Ms. Williams would be alone. The Williams' children had previously been removed from the home by state social services authorities, and stayed with Ms. Williams' mother. The Tates intended to take drugs or money if they could find it, and Dustin Tate wanted to rape Ms. Williams. (Dustin Tate statement at 9; Chad Tate pre-plea statement at 7). Among other weapons, Dustin brought along a taser gun in order to stun her for that purpose. (TT 4741, 4762-65; Nicholas Tate statement; Dustin Tate plea at pp. 36-41). Three-year-old Katelyn Williams, who had been dropped off for visitation at her mother's home earlier, answered the

door; Chrissie Williams was asleep. When Dustin Tate used his stun gun on Ms. Williams intending to render her unconscious, it served instead to waken her, and she then struggled against Dustin Tate's attempts to tie her up. Katelyn Williams began to scream and run around, and Petitioner told his brother Chad to move her to another room in an attempt to quiet her. Chad Tate ran after her and chased her into another room. When he could not quiet her he took a phone cord and strangled her until she was quiet. He then left the room. Katelyn recovered consciousness and again began screaming; Chad Tate this time took a knife, went into the room and cut her throat. (Chad Tate plea at 54-55) Katelyn's little brother was in a crib in the room; Chad Tate pushed Katelyn's body out of sight behind the bed so the brother would not see her. *Id.* at 57. When the others saw that Katelyn was dead, they panicked. Dustin Tate ran from the house; Nicholas Tate put a pillow over Chrissie Williams' head and shot her. *Id.* at 59.

The three fled. They drove to Mississippi and at a gas station, forced Angie Rowzee, an employee of the store, into her car. They drove until they reached Batesville, Mississippi, where they stopped at a motel. Concerned that his brothers might harm Ms. Rowzee, Nicholas Tate made Dustin and Chad stay in one room while he stayed with Ms. Rowzee. (TT 4437). He released her unharmed at a rest stop the next morning, and the brothers drove on to Oklahoma.

There, they contacted authorities and followed directives to turn themselves in.

An attorney hired by the Tate's parents notified police he wanted to speak with the defendants prior to any interrogation, but police did not tell Nicholas or Dustin this, and they each gave statements. Chad Tate was a juvenile and as such was permitted to call his parents. They informed him a lawyer had been hired and as a result, he refused to give a statement.

The statements of the Tate brothers were similar in material respects: they had been taking methamphetamine, marijuana, valium, and huffing videotape cleaner. (Chad Tate pre-plea statement at 9; Dustin Tate plea at 32-34). They had decided to leave town. They loaded a vehicle with weapons and supplies. Dustin Tate had the idea to rape Chrissie Williams, and they proceeded to the residence after stopping at a hunting goods store and purchasing duct tape and knives. Chad Tate had killed Katelyn unexpectedly and they had panicked. Nicholas Tate told police that the shot which killed Chrissie Williams had gone off accidentally. Chad Tate repeated this in an interview prior to pleading guilty eleven months later. (Chad Tate pre-plea statement at 9).

The Tates were charged with malice murder, multiple counts of felony murder, five counts of aggravated assault, two counts of kidnapping, four of burglary, one of conspiracy to commit armed robbery, two of cruelty to children, two of possession of a firearm in the commission of a felony, two of false

imprisonment, and one of aggravated child molestation.[1]

Chad Tate was offered a plea of life sentences with parole eligibility in 14 years. Having stated in a pre-plea interview that Katelyn Williams' body was nude because she wriggled out of her pajama suit while he was attempting to catch her, Chad was permitted to enter an Alford plea to the charge of child molestation. He also entered an Alford plea to the murder of Ms. Williams because of his belief that the gun fired accidentally. During the plea colloquy, the prosecutor noted that the three Tate brothers had consumed a "considerable amount of drugs" prior to the crime.

Dustin Tate, a "sexual predator" according to his brother Chad (Chad Tate plea at 47), pled guilty four days later. In exchange for not seeking the death penalty, Dustin agreed to testify against Nicholas and not to seek parole for 22½ years. Eight months after the brothers' pleas, the state issued a notice of intent to seek death against Nicholas Tate.

The trial began in November of 2005. During voir dire, Nicholas Tate pleaded guilty to all the charges

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[1] There was no evidence of child molestation but Katelyn's body was found unclothed. Chad Tate stated that Katelyn had come out of her pajama suit while he was chasing her. (Chad Tate pre-plea statement at 13). The prosecutor characterized the factual basis of the molestation charge as the "act of removing clothing is child molestation in these circumstances," in accepting Chad Tate's plea.

against him and waived a jury trial on sentencing, opting for a bench trial. Mr. Tate even insisted on pleading guilty to the charge of child molestation, although the prosecutor stated later (in arguing the plea was a ploy to avoid the death penalty) that there was no evidence to support the charge and that the State had offered to dismiss the charge. (TT 5155). Despite evidence that Mr. Tate had previously been sexually abused by his older brother, that he had protected the woman whom the trio had carjacked on their journey west following the crimes, and that the killings were not planned, the trial judge sentenced Mr. Tate to death. Mr. Tate thereafter refused contact with his attorneys and was permitted to waive his motion for a new trial in the trial court, despite his statement that he did not wish to die and did not choose the death sentence, but was completely remorseful would "fully and willingly submit" to the death sentence. (Status Hearing on Motion for New Trial, June 30, 2009 at p. 8).

REASONS FOR GRANTING THE WRIT

1. THE SUPREME COURT OF GEORGIA HAS ABANDONED THE PROPORTIONALITY REVIEW OF DEATH SENTENCES IN CONTRAVENTION OF THIS COURT'S DECISIONS IN *GREGG V. GEORGIA*, 428 U.S. 153 (1976), AND *ZANT V. STEPHENS*, 462 U.S. 862 (1983), AND IN VIOLATION OF THE EIGHTH AMENDMENT

A. Introduction

The constitutionality of Georgia's death penalty scheme is premised upon a thorough proportionality review by the Supreme Court of Georgia. *Gregg v. Georgia*, 428 U.S. 153, 205-206 (1976). This purpose of the review is to provide a Georgia criminal defendant "with an added safeguard from the imposition of an arbitrary sentence." O.C.G.A. § 17-10-35(c)(3). As this Court has held, without such a safeguard, the risk that Georgia courts would impose aberrant death sentences would prove both untenable and unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J.); *Id.*, at 248, 2731 (Douglas, J.); *Id.*, at 309-310, 2762 (Stewart, J.); *Id.*, at 312, 2764 (White, J).

In affirming Mr. Tate's sentence of death, however, the Supreme Court of Georgia abdicated its constitutionally-required duty to conduct a thorough review of whether his sentence was proportional with other sentences imposed in Georgia courts. Instead, the Supreme Court of Georgia listed 23 cases in which it

had upheld sentences of death in cases with more than one victim, and stated that those cases supported its conclusion by showing "a significant number of juries have been willing to impose death sentences in cases where a defendant has murdered more than one person . . . ". 695 S.E.2d at 596. The Supreme Court of Georgia's failure to review cases in which lesser sentences were imposed prevented it from discovering that many cases far more aggravated than Mr. Tate's have resulted in sentences of less than death.

The consequence of the Supreme Court of Georgia's failure to conduct the proportionality review that it represented to this Court that it would undertake of every death sentence is that the death penalty in Georgia is imposed in an arbitrary and capricious manner. The Supreme Court of Georgia's refusal to meet its constitutional obligations has subjected Mr. Tate to cruel and unusual punishment in violation of his rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, this Court should grant certiorari.

B. The Constitutionality of Georgia's Death Penalty Regime Is Premised Upon Meaningful Proportionality Review

Since *Furman v. Georgia*, 408 U.S. 238, 310, 313 (Stewart, J., concurring) (White, J., concurring) (1972), this Court has required those states that permit capital punishment to institute procedures that provide a "meaningful basis for distinguishing the

few cases in which it is imposed from the many cases in which it is not." *Id.*; *see also Parker v. Dugger*, 498 U.S. 308 (1991). In striking down Georgia's capital sentencing scheme in particular, this Court observed that Georgia placed unfettered discretion in the hands of juries, resulting in the arbitrary, and often discriminatory, issuance of capital sentences. *See*, *Furman*, 408 U.S. at 254-256 (Douglas, J., concurring). Consequently, death sentences in Georgia were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.*, quoting *Furman*, 408 U.S. at 309 (Stewart, J., concurring opinion).

In response, Georgia amended its statutory scheme to charge the Georgia Supreme Court with determining whether each death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 17-10-35. In upholding the new Georgia scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court emphasized three critical safeguards in the scheme, including proportionality review, and concluded that this review "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* at 206. In *Gregg*, the Court explained how the Georgia statute had addressed the concerns of *Furman* as follows:

> [T]he Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The

> new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Gregg, 428 U.S. at 204.

Meaningful proportionality review is especially important in a system like Georgia's which makes virtually every murder "death-eligible" and which gives juries no guidance in weighing aggravating and mitigating circumstances.[2] Ga. Code Ann. § 17-10-30 (2008) (listing eleven aggravating circumstances which include almost any conceivable murder). Because prosecutors face few limitations in seeking the death penalty and juries few limitations in imposing it, review by the Georgia Supreme Court is the only way to ensure that the ultimate punishment is applied consistently, and only in the most extreme cases.

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[2] Georgia's capital punishment statute holds that "[a] person commits murder when he unlawfully and with malice aforethought . . . causes the death of another human being." Ga. Code Ann. § 16-5-1. "A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice." *Id.*

Meaningful proportionality review guards against the twin dangers of discrimination and arbitrariness. A person should not be sentenced to die based on the part of the state in which the crime occurs, the district attorney who happens to prosecute the case, the race of the victim or the race of the defendant. None of these factors concerns the culpability of the defendant. The robust proportionality review described by this Court in *Gregg* satisfied the requirement that capital punishment be "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2650 (2009) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

When this Court decided *Gregg*, the Georgia Supreme Court was using for comparison purposes "not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Stephens v. State*, 237 Ga. 259, 260 (1976). This Court held that the Supreme Court of Georgia's proportionality review passed constitutional muster because its scope included similar cases in which a sentence of *life*, and not just death, were imposed. *Gregg*, 428 U.S. at 204-205. As Associate Justice Stevens, a member of this Court when *Gregg* was issued, would later write, "[w]e assumed that the court would consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful proportionality review." *See Walker v. Georgia*, ___ U.S. ___,

129 S.Ct. 453 (2008) (statement of Stevens, J., respecting denial of cert). The Supreme Court of Georgia later confirmed that assumption with its response to a certified question posed in *Zant v. Stephens*, 462 U.S. 862 (1983), in which that Court expressly stated that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Zant*, 462 U.S. at 880, n.19. "That approach seemed judicious," Justice Stevens wrote, "because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Walker*, 129 S.Ct. at 454-455.

C. The Georgia Supreme Court has Abandoned the Proportionality Review Mandated by *Gregg v. Georgia* and *Zant v. Stephens*

Proportionality review is meaningful only when the court conducting it thoroughly and methodically compares the outcomes in cases involving similarly situated defendants. In the years immediately following this Court's approval of Georgia's revamped death penalty scheme in *Gregg*, the Georgia Supreme Court vacated several death sentences as disproportionate after conducting a comparative proportionality review which analyzed the circumstances of the crime, the characteristics of the defendant, and sentences imposed in similar or identical cases, as well as cases

"as to which the death penalty could have been sought by the prosecutor but was not." *Horton v. State*, 249 Ga. 871, 880 n.9 (1982).[3] In the years since, however, that Court not only has declined to vacate death sentences on proportionality grounds, but also has abandoned any meaningful comparative proportionality review of the death sentences that come before it on direct appeal. *See Thomason v. State*, 268 Ga. 298, 486 S.E.2d 861, 875-876 (1997) (Benham, C.J., dissenting) (decrying court's failure to undertake meaningful proportionality review and concluding "[t]he majority's affirmance of the sentence in this case lowers the standard to be applied to subsequent death penalty cases, and threatens to make routine the most serious penalty that can be imposed in this state"). Consequently, Justice Stevens recently questioned whether the Supreme Court of Georgia's failure to conduct meaningful proportionality review has brought it into conflict with the mandates of *Gregg* and the Eighth Amendment. *See Walker v. Georgia*, *supra*.[4]

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[3] *See, e.g., Hall v. State*, 241 Ga. 252, 244 S.E.2d 833 (1978) (death sentence disproportionate for felony murder when co-defendant received life sentence in subsequent jury trial); *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977) (death sentence disproportionate for murder when defendant had received life sentence for same crime in previous trial); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975) (death sentence disproportionate for armed robbery).

[4] This Court determined that as Walker had procedurally defaulted his proportionality claim, it was not properly before the Court. Mr. Tate respectfully submits that his case is in a

(Continued on following page)

In light of the Court's grounds for authorizing Georgia's resumption of the death penalty, Justice Stevens wrote, the proportionality review conducted in Mr. Walker's case was constitutionally lacking. *Id.* at 455. Justice Stevens further criticized the court's citation to only death cases.

> The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury.
>
> Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment.

Id. at 456.[5]

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different procedural posture as he argued the proportionality of his sentence to the Georgia Supreme Court on appeal. Brief of Appellant at 45; 695 S.E.2d at 596.

[5] Justice Stevens wrote that the Supreme Court of Georgia had abandoned its practice of including cases that did not result in a death sentence in its proportionality review following this decision in *Pulley v. Harris*, 465 U.S. 37 (1984), which held that the Eighth Amendment does not require comparative proportionality review of every capital sentence. *Id.* at 457, citing *Pulley*, 465 U.S. at 44-46. But, as Justice Stevens wrote, *Pulley* "was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them," not "to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme." *Id.*

"Particularly troubling" Justice Stevens wrote, "is that the shortcomings of the Georgia Supreme Court's review are not unique to this case." *Id.* Noting that it "now appears to be the court's practice never to consider cases in which the jury sentenced the defendant to life imprisonment,"[6] Justice Stevens concluded "[t]his is not the review that the Georgia Supreme Court represented to us in *Zant*." *Id.* Justice Stevens closed as follows:

> [T]he likely result of such a truncated review – particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors – is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

Id.[7]

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[6] Citing Note, 39 Ga. L. REV. 631, 657 (2005) (determining that in each of 55 capital cases reviewed by the Georgia Supreme Court between 1994 and 2004, the court exclusively considered other cases resulting in a death sentence).

[7] Nor was Justice Stevens the only witness to the Supreme Court of Georgia's abdication of its constitutional obligations. In 2007, the Atlanta Journal-Constitution uncovered a flaw in that Court's proportionality review that further exposes its inadequacies. As the Journal-Constitution detailed, that Court, in determining that the death sentences of Georgia defendants were proportional, regularly relied upon cases in which the death sentences were later overturned as the product of constitutional error. Bill Rankin, Heather Vogell and Alice Wertheim, *High court botched death reviews*, ATLANTA JOURNAL-CONSTITUTION,

(Continued on following page)

D. Other More Aggravated Cases Resulted in Lesser Sentences

The Supreme Court of Georgia's omission from its proportionality review of cases in which the defendants received sentences of less than death, renders Georgia's capital punishment scheme constitutionally infirm. As this Court has held:

> [T]he State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words, 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring). These values underlie the Constitution's requirement that a defendant be sentenced in

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Sep. 26, 2007, at A1, A4; *see generally* Bill Rankin, et al., *A Matter of Life or Death: An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 24-27, 2007. The newspaper also analyzed the application of the death penalty in Georgia and found that the state continues to impose sentences in an arbitrary fashion. With University of Maryland criminologist Ray Paternoster, the Journal-Constitution reviewed 1,315 murder cases from 1995 through 2004 that could have been prosecuted for death, and found that prosecutors pursued a death sentence in only one of every four of those cases. Among those cases in which the state elected not to seek a death sentence were 375 murder cases involving rape, torture or maiming, or multiple killings. Of those few cases in which the state did opt to seek a death sentence, only one in twenty-three resulted in a sentence of death. Indeed, from 2000 to 2007, juries decided against death in two of every three sentencing trials.

a manner consistent with the treatment of similarly situated offenders. *Furman*, 408 U.S. 238; *Thomason v. State*, 268 Ga. 298, 314, 486 S.E.2d 861, 875 (1997) (Bentham, C.J., concurring in part and dissenting in part). They also form the basis of the Supreme Court of Georgia's purported position that it will "not affirm a sentence of death unless in similar cases throughout the state the death penalty has been imposed generally, and not wantonly and freakishly." *Horton v. State*, 249 Ga. 871, 880, 295 S.E.2d 281, 289 (1982) (internal quotes omitted).

The degree to which that omission compromises the Court's proportionality review is evidenced by the fact that defendants not only similarly situated to Mr. Tate, but in fact much more culpable than he, routinely receive sentences of less than death. Indeed, in many of these cases, the state did not even seek the death penalty – a consideration the Supreme Court of Georgia has claimed as important to its review, but that it neglected in Mr. Tate's case. *Horton*, 295 S.E.2d at 289 ("We *do* compare cases as to which the death penalty could have been sought by the prosecutor but was not." (emphasis in original)).

The Georgia statute requires that proportionality review consider not only the nature of the crime, but also the nature of the defendant. Ga. Code Ann. § 17-10-35 (requiring the Georgia Supreme Court to consider whether the sentence is excessive or disproportionate "considering both the crime and the defendant"). Mr. Tate was 21 years old at the time of the crime, with no prior record. He had been hospitalized and

diagnosed with depression stemming from repeated childhood sexual abuse by his older brother, who was ultimately sentenced to five years in prison for rape, incest and child molestation. (Sentencing Def. Ex. 17) He was under the influence of "a considerable amount of drugs" at the time of the crime, as indicated by the prosecutor. There was no evidence that the killings were premeditated.

However, Paulding is a rural county and the victims were white. Katelyn was only 3 years old, and her killer Chad Tate could not be charged capitally because he was a juvenile. Dustin Tate was not the actual killer of either victim although if not for him, the brothers would not have gone to the Williams residence in the first place. Yet, in spite of the fact Nicholas Tate had subsequently protected carjacking victim Angie Rowzee from his brothers and had surrendered in Oklahoma without further violence, the prosecutor sought death for Nicholas Tate. And when Nicholas Tate pleaded guilty out of heartfelt remorse (TT 4096-97) (even to the crime of child molestation, for which the prosecutor admitted there was no evidence), the trial court sentenced him to death.

In its brief discussion of proportionality review in Mr. Tate's case, the Georgia Supreme Court wrote that the death penalty for Mr. Tate was not disproportionate to the life sentences imposed on his brothers because Chad was ineligible for death and Dustin was not a triggerman. This was the only analysis of the issue. The Court did not cite any cases in which

life sentences were imposed in which the State did not seek death at all. It merely listed cases in which the death penalty had been imposed which involved more than one victim.

If the Court had looked beyond cases in which a death sentence was imposed, it would have found numerous cases that resulted in life sentences for comparable, or worse, crimes. Cases of multiple homicides that result in sentences of less than death are legion. For a recent example, one needs look no further than Brian Nichols, the notorious Fulton County Courthouse killer, who killed a judge, court reporter, sheriff's deputy, and federal agent, yet was not sentenced to death. Importantly, far more aggravated deaths of children have resulted in sentences of less than death in Georgia. Indeed, many of these cases feature horrific torture and sexual assault, or acts that could be described only as those of a serial killer. In 1993, for example, Ahmund Dunnigan, the leader of a gang called "Doom", supervised the torture and murder of 13-year-old Marsinah Johnson and 15-year-old Nekita "Nikki" Waller.[8] Dunnigan and his men kidnapped Johnson and beat her until she bled,

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[8] For accounts of Dunnigan's crime and sentence, *see* Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007; Mark Silk, *Gang Chief Admits Torture Killing of Girl; Doom Leader Gets Life, Must Testify Against Others*, ATLANTA JOURNAL-CONSTITUTION, May 10, 1995; Jay Croft, *Man Gets Life for Torturing, Killing Girl; Gang Leader Pleads Guilty, Avoids Trial*, ATLANTA JOURNAL-CONSTITUTION, January 6, 1998.

burned her thighs with a red-hot knife and coat hanger, and doused her wounds with alcohol. *Id.* At one point Dunnigan told Johnson that he would let her live if she gave him her soul. When she agreed, he directed her to blow into an open peanut butter jar. He then closed the lid and told her "Now I own your soul." They blindfolded Johnson and drove her to the railroad tracks, sodomizing her and forcing her to perform oral sex as they drove. When they arrived, Dunnigan handed a gun to another gang member, who shot Johnson in the head. They shot her in the head again to be sure she was dead. Johnson's body was subsequently hit by a train, which dragged her some 300 feet.

In a separate incident that same year, Dunnigan and three others offered Waller a ride home, then drove her to an apartment where he and at least eight other men tortured and sexually assaulted her for three days. Dunnigan forced Waller to drink a mixture of salt and bleach, shocked her with a car battery, choked her with an electric cord until it snapped, set her on fire, and stabbed her. When Waller begged Dunnigan and the men to kill her, they drowned her in a cooler filled with water, with Dunnigan holding her head underwater.

Despite the horrific nature of his crimes Dunnigan was allowed to enter a plea bargain in Dekalb County for the murder of Johnson, and received three consecutive life sentences. He was also allowed to enter a plea bargain in Fulton County for

the murder of Waller, and received a sentence of life without parole.

Another Georgia defendant serving a life sentence is serial killer Wayne Williams, convicted of two murders and implicated in twenty-two others in the infamous Atlanta "Missing and Murdered Children" cases of 1979-1981. Eighteen of the victims whose deaths are attributed to Williams were between the ages of nine and seventeen. All were asphyxiated and left in fields and rivers across Atlanta. Following his 1982 convictions in Fulton County, however, he was given two life sentences. Gary Pomerantz, *10 years after – missing and murdered*, ATLANTA JOURNAL-CONSTITUTION, Jun. 16, 1991.

In addition to Dunnigan and Williams, many other cases in Georgia in recent years involving multiple victims, one of whom was a child, have resulted in sentences other than death. In fact, an analysis of the FBI's Supplemental Homicide Reports from 1986 to 2008 shows that during this period, there were 429 homicides involving more than one victim and that in 106 of those cases, one of the victims was a child.[9]

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[9] A quantitative analysis of the SHR shows that there have been many homicides involving children in the years covering the modern death penalty in Georgia. From 1986 to 2008 there were 13,661 homicides in Georgia. Of that, 1,180 or 8.6% involved at least one child victim. This is an average of fifty-three per year.

Summaries of an additional twenty-eight of those 106 cases of multiple murders with at least one child victim can be found in Appendix 3 to this petition.[10] These summaries involve thirty defendants, none of whom received the death penalty. Many of the cases feature elements of torture or cruelty. Yet all of them resulted in sentences of less than death. In many, the state either never sought a death sentence or offered the defendant a lesser sentence in exchange for a guilty plea.

Mr. Tate does not offer these examples to diminish the deaths of Ms. Williams and Katelyn. He offers them because they show that the Supreme Court of Georgia's failure to conduct the thorough proportionality review required by statute and this Court's case law left it without the context necessary to ensure that Mr. Tate's sentence comported with the Constitution. In the end, it is impossible to articulate any rational explanation for why Mr. Tate's case resulted in a sentence of death while the appended cases and others discussed herein did not. These summaries demonstrate, however, that more aggravated cases than Mr. Tate's regularly result in sentences of less than death. As there is no rational way to distinguish

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[10] This is by no means an exhaustive list of every multiple murder case in Georgia involving the death of a child. Because the FBI's Supplemental Homicide Reports do not list case names, counsel was unable to locate all of the cases with the resources presently available.

Mr. Tate's case from these life sentence cases, Mr. Tate's sentence is arbitrary and disproportionate.

As this Court has repeatedly made clear, errors such as these are critical because of the qualitative difference between a death sentence and the typical sentence imposed in such cases.

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also Gardner v. Florida*, 430 U.S. 349, 357 (1977). Because of this categorical difference, murder alone is not constitutionally sufficient to warrant the use of the death penalty; rather, "this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg*, 428 U.S. at 182.

The Eighth Amendment also requires that punishment serve a legitimate end. If a lesser punishment is able to satisfy society's legitimate interests, execution becomes nothing more than the "pointless and needless extinction of life" which is "patently excessive," violating both the Eighth Amendment and Georgia law. *Furman*, 408 U.S. at 312 (White, J., concurring). The fact that lesser sentences than death are imposed to punish offenders culpable to an equal or greater degree than Mr. Tate demonstrates that

such a sentence would suffice to serve society's legitimate penal interest in his case. The imposition of a more severe punishment would be merely gratuitous. As this Court has held, if an execution would serve no purpose save the wanton and unnecessary infliction of pain, the Eighth Amendment demands that it be set aside. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

CONCLUSION

It is incontrovertible that the Supreme Court of Georgia has abandoned the thorough proportionality review of death sentences required by Georgia's death penalty statute and which formed a critical consideration in this Court's decision allowing Georgia to resume the death penalty in *Gregg v. Georgia*. In sum, the Supreme Court of Georgia has defaulted on its commitment to this Court to apply a critical safeguard against the imposition of arbitrary and capricious sentences of death. Accordingly, Mr. Tate's sentence is disproportionate, arbitrary and capricious. This Court should grant certiorari.

Respectfully submitted this 24th day of November, 2010.

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695 S.E.2d 591

Supreme Court of Georgia.

TATE

v.

The STATE.

No. S10P0477.

June 1, 2010.

Reconsideration Denied June 28, 2010.

Mitchell D. Durham, Marietta, Benjamin B. Reed, Canton, for appellant.

Fred A. Lane, Jr., Dist. Atty., Anthony Volkodav, Jr., Asst. Dist. Atty., Thurbert E. Baker, Atty. Gen., Lyndsey J. Hurst, Asst. Atty. Gen., for appellee.

Brian Kammer, Georgia Resource Center, Atlanta, Richard A. Malone, Prosecuting Attorneys' Council, for the other party.

BENHAM, Justice.

Chrissie Williams and her three-year-old daughter, Katelyn Williams, were found dead in their home. Chrissie Williams was found bound to a bed with handcuffs and duct tape, and she had a bullet wound to her head. Katelyn Williams was found naked on the floor of another room, and her throat had been slit. Nicholas Cody Tate pleaded guilty to both murders and to related crimes, and he waived his right to

a jury trial as to sentencing for the murders.[1] At the conclusion of a bench trial on sentencing, the trial court found the existence of multiple statutory aggravating circumstances and sentenced Tate to death for each of the murders. *See* OCGA § 17-10-30(b). For the reasons set forth below, we affirm Tate's convictions and sentences.

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[1] The crimes occurred on December 11, 2001. Tate was indicted by a Paulding County grand jury on February 20, 2002, on two counts of malice murder, eight counts of felony murder, five counts of aggravated assault, two counts of kidnapping, four counts of burglary, one count of conspiracy to commit armed robbery, two counts of cruelty to children in the first degree, two counts of possession of a firearm during the commission of a felony, two counts of false imprisonment, and one count of child molestation. The State filed written notice of its intent to seek the death penalty on July 8, 2003. On November 15, 2005, Tate pleaded guilty to eight of the twenty-nine charges against him, including the two counts of malice murder. Tate waived his right to a jury trial on sentencing for the murders, and a bench trial was conducted from November 28 to December 2, 2005. On December 19, 2005, the trial court sentenced Tate to death for each of the murders and to the following terms of imprisonment for the remaining counts to which Tate pleaded guilty, each to be served consecutively: two life terms for each of the two counts of kidnapping; ten years for conspiracy to commit armed robbery; ten years for child molestation; fifteen years for cruelty to children in the first degree; and five years for possession of a firearm during the commission of a felony. Tate filed a motion for a new sentencing trial on January 18, 2006, which the trial court allowed withdrawn in an order filed on July 7, 2009. Tate filed a notice of appeal on August 6, 2009, the appeal was docketed on November 30, 2009, for the January 2010 term of this Court, and the case was orally argued on March 8, 2010.

Guilty Pleas

1. Tate argues that his guilty pleas to the two counts of kidnapping and the one count of child molestation were not supported by a showing of a sufficient factual basis and, therefore, that those pleas were taken in violation of Uniform Superior Court Rule 33.9, which states as follows:

> Notwithstanding the acceptance of a plea of guilty, judgment should not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.

Tate also argues that the alleged lack of a showing of a factual basis for these contested pleas also renders those pleas unconstitutional. We reject Tate's arguments because, as we discuss below, we find no merit[2] to Tate's assertion that there was a lack of a factual basis shown to the trial court in the plea hearing for these contested pleas.

(a) Tate argues that the factual basis for his guilty pleas to the two kidnapping counts was inadequate because the movement of the victims was not of

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[2] Because we find that a sufficient factual basis was found by the trial court during the plea hearing itself, we need not address Tate's claims under the more demanding "manifest injustice" standard that is applied where a reviewing court determines that there was *not* a sufficient factual basis found by the trial court at the plea hearing. *See Wharton v. Henry,* 266 Ga. 557(2), 469 S.E.2d 27 (1996); *State v. Evans,* 265 Ga. 332(3), 454 S.E.2d 468 (1995).

a character that can satisfy the asportation element of the crime of kidnapping. The question of whether the factual basis for his plea correlated with the elements of the crime of kidnapping must be examined in light of the statutory definition of kidnapping that was in force at the time of Tate's crimes rather than the broader definition of kidnapping established by the recent amendment to the kidnapping statute by the General Assembly. *See* OCGA § 16-5-40 (defining kidnapping); Ga. L.2009, p. 88, § 1 (altering the definition of kidnapping); *Dixon v. State,* 300 Ga.App. 183, 184 n. 3, 684 S.E.2d 679 (2009) ("[B]ecause the amendment [to the kidnapping statute] applies to crimes committed on or after the revision's effective date of July 1, 2009, it is inapplicable here. . . ."). This Court has created a four-part test for whether the movement of a victim satisfies the element of asportation within the meaning of the statutory definition of kidnapping that was in force at the time of Tate's crimes. *Garza v. State*, 284 Ga. 696(1), 670 S.E.2d 73 (2008). The factors in that four-part test are the following:

> (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense.

Id. at 702(1) The factual basis shown to the trial court for Tate's guilty pleas, including Tate's

videotaped interrogation,[3] correlated sufficiently with the definition of kidnapping imposed by this four-part test. Although the movement of both victims spanned a relatively-short duration and occurred while most of the other offenses were ongoing or not yet committed, the movement "was not an inherent part" of any of the other offenses, and the movement "created an additional danger to the victims by enhancing the control of the [Tate brothers] over them." *Henderson v. State,* 285 Ga. 240(5), 675 S.E.2d 28 (2009).

b. The strongest portion of the factual basis for Tate's guilty plea to child molestation[4] was his own

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[3] During its presentation of a factual basis for Tate's guilty plea, the State provided a brief account of the crimes, but it also made specific reference to Tate's videotaped interrogation, which the trial court had reviewed during pre-trial proceedings. We conclude that the trial court, in accepting Tate's guilty plea, "tacitly agreed with the prosecutor regarding the court's familiarity" with Tate's videotaped interrogation as being part of the factual basis for Tate's plea. *Adams v. State,* 285 Ga. 744(4)(a), 683 S.E.2d 586 (2009). Whether or not, as is discussed further below, the trial court had previously ruled correctly pre-trial in concluding that the videotaped interrogation would be admissible by the State as evidence at trial is irrelevant to Tate's guilty plea, because the showing of a factual basis for a plea need not be done through admissible evidence. *See, e.g., Adams,* 285 Ga. at 747(4)(a), 683 S.E.2d 586 (factual basis for a plea shown through the trial judge's familiarity with the co-defendant's case); *Green v. State,* 265 Ga. 263(2), 454 S.E.2d 466 (1995) (considering facts alleged in the indictment as part of a showing of the factual basis for a plea).

[4] *See* OCGA § 16-6-4 ("A person commits the offense of child molestation when such person . . . [d]oes any immoral or indecent act to or in the presence of or with any child under the age

(Continued on following page)

statement in the plea hearing that he himself had undressed Katelyn Williams for the purpose of his sexual arousal. Tate argues that this statement by him at his plea hearing was contradicted by previous statements by himself and his co-defendants. However, the requirement that a factual basis be shown for a plea "is to protect against someone pleading guilty when that person may know what he has done but may not know that those acts do not constitute the crime with which he is charged." *State v. Evans*, 265 Ga. 332(2), 454 S.E.2d 468 (1995). In assessing the factual basis for a plea, the trial court "need not make itself aware of evidence establishing the pleader's guilt beyond a reasonable doubt. . . ." *King v. Hawkins*, 266 Ga. 655, 656, 469 S.E.2d 30 (1996). Accordingly, we conclude that the factual basis for Tate's guilty plea to the one count of child molestation was adequate, despite the existence of several contradictory accounts of the crimes that had been given previously by Tate and his brothers.

Sentencing Trial

2. The trial court denied Tate's pre-trial motion to suppress his videotaped interrogation. Despite the fact that the videotape is marked in the record as an exhibit of the State, a review of the sentencing trial record reveals that the videotape was actually

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of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person. . . .").

introduced by Tate during his cross-examination of a witness for the State. Accordingly, we conclude that Tate has waived the right to complain on appeal about the introduction of the videotape as evidence at his sentencing trial. *See Anderson v. State,* 286 Ga. 57(6), 685 S.E.2d 716 (2009).

3. As was discussed above, the actions that Tate participated in constituted kidnapping within the meaning of the kidnapping statute that was in force at the time of his crimes. *See Henderson,* 285 Ga. at (5), 675 S.E.2d 28. Accordingly, there is also no merit to his argument that the trial court erred by finding the existence of statutory aggravating circumstances based on the kidnappings of the two victims. *See* OCGA § 17-10-30(b)(2).

4. The evidence showed that Nicholas Tate directed Chad Tate, his 15-year-old brother, to silence Katelyn Williams, who was only three years old. Chad Tate emerged from the room where he had strangled the child with a telephone cord, likely with his hands showing obvious signs of what he had done. When the child regained consciousness and began screaming again, Nicholas Tate, who had initially sent Chad to silence the child, allowed Chad Tate to take his knife and to return to the room where the child was. The evidence also showed that Nicholas Tate had been intent upon eliminating potential witnesses and that Katelyn Williams had recognized him and had called him by name. Both Chad and Nicholas Tate's pants were shown to have been stained with Katelyn Williams's blood. The trial

court, acting as the finder of fact, was authorized to find that Nicholas Tate directed his young brother to murder the child. As we have held, one "who directs a follower or lackey to commit murder" is guilty of the statutory aggravating circumstance addressing persons who cause or direct another to commit murder as an agent or employee. *Mize v. State,* 269 Ga. 646(14), 501 S.E.2d 219 (1998) (construing OCGA § 17-10-30(b)(6)). Accordingly, we find no merit to Tate's argument that the trial court erred by finding the existence of the statutory aggravating circumstance addressing one who has directed another to murder as his or her agent or employee. *See* OCGA § 17-10-30(b)(6).

5. Tate argues that the statutory aggravating circumstances concerning armed robbery in his case are invalid because, despite overwhelming evidence that he attempted to steal things from the victims' home, there was not evidence sufficient to prove beyond a reasonable doubt that he succeeded in actually stealing anything. We find no error, because a murder may be found to have been committed while the murderer was "engaged in the commission" of an armed robbery even if the attempted armed robbery fails or is otherwise abandoned. OCGA § 17-10-30(b)(2). *See Amadeo v. State,* 243 Ga. 627, 631, 255 S.E.2d 718 (1979) (construing OCGA § 17-10-30(b)(2)).

6. There is no merit to Tate's argument that the one armed robbery cannot serve as a statutory aggravating circumstance for both of the murders. *See*

Isaacs v. State, 259 Ga. 717(43)(a), 386 S.E.2d 316 (1989).

7. Tate argues that this Court's rule against "mutually supporting aggravating circumstances" has been violated by the trial court's finding that Chrissie Williams was murdered during the commission of the murder of Katelyn Williams and that Katelyn Williams was murdered during the commission of the murder of Chrissie Williams. Even if, pursuant to this Court's rule against "mutually supporting aggravating circumstances," we were to set aside one of the statutory aggravating circumstances in question, there would remain sufficient statutory aggravating circumstances to support both of the two death sentences in this case. *See Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Lance v. State,* 275 Ga. 11(25), 560 S.E.2d 663 (2002). Thus, pretermitting whether this Court's rule against "mutually supporting aggravating circumstances" is constitutionally or otherwise required, we conclude that Tate's death sentences are valid even assuming the continued validity of that rule.

8. Because it is clear that at least one valid statutory aggravating circumstance existed in Tate's case, the trial court, acting as the sentencing agent upon Tate's waiver of his right to a jury trial on sentencing, was authorized to exercise its discretion in imposing the two death sentences. *Id.*

Sentence Review

9. Under Georgia statutory law, this Court must review the evidence in every case in which the death penalty has been imposed and address three statutory questions. *See* OCGA § 17-10-35(c). Therefore, we summarize the evidence presented in Tate's sentencing trial in more detail below.

The evidence presented in Tate's sentencing trial, including his videotaped interrogation, showed that he and two of his brothers, Dustin Tate and Chad Tate, purchased ammunition, duct tape, and knives at a local sporting goods store and formulated a plan to burglarize the home of Chrissie Williams, to steal drugs and money from her home, and to rape her. When they arrived at the home, Katelyn Williams, Chrissie Williams's three-year-old daughter, answered the door. Dustin Tate shocked Chrissie Williams with a stun gun, believing it would render her unconscious. When his attempt to render her unconscious failed, Dustin Tate forced Chrissie Williams from the room where she had been sleeping and where her infant son was screaming to the room across the hallway. Both Nicholas Tate and Chad Tate assisted Dustin Tate either in taping Chrissie Williams's mouth and eyes with the duct tape or in handcuffing her hands to the headboard and taping her legs to the footboard of the bed. Nicholas Tate threatened to beat Chrissie Williams with his handgun if she did not abandon her attempts at screaming. Nicholas Tate rummaged through the home and through Chrissie Williams's purse looking for drugs and money. Chad

Tate and Nicholas Tate undressed Katelyn Williams for their sexual gratification. When Katelyn Williams would not stop screaming, Nicholas Tate directed Chad Tate to silence her. After Chad Tate's attempt to murder her by strangling her failed, Nicholas Tate allowed Chad Tate to take his knife. Chad Tate slit Katelyn Williams's throat several times and then pushed her off of the bed onto the floor, where she eventually bled to death. Dustin Tate left the house out of fear. Nicholas Tate then placed a seat cushion over Chrissie Williams's head as she lay bound to a bed, and he fired one shot through her head, killing her. After killing the two victims in Georgia, the three brothers fled the state, kidnapped a woman and stole her vehicle in Mississippi, and finally surrendered to authorities in Oklahoma.

(a) Viewed in the light most favorable to the verdict, the evidence presented at Tate's sentencing trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of each of the statutory aggravating circumstances found in his case. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); OCGA § 17-10-35(c)(2) (mandating a review of the sufficiency of the evidence supporting statutory aggravating circumstances).

(b) Upon our review of the record, we conclude that the sentences of death in Tate's case were not imposed under the influence of passion, prejudice, or any other arbitrary factor. *See* OCGA § 17-10-35(c)(1)

(mandating a review by this Court for such impermissible influences in all cases where the death penalty has been imposed).

(c) Considering both the crimes and the defendant, we conclude that the death sentences in Tate's case are not disproportionate punishment within the meaning of Georgia law and are not unconstitutional. *See* OCGA § 17-10-35(c)(3); *Gissendaner v. State,* 272 Ga. 704(19)(a), 532 S.E.2d 677 (2000) (stating that this Court's statutorily-mandated proportionality review concerns whether a particular death sentence "is excessive per se" or is "substantially out of line" for the type of crime involved and concluding that this Court's proportionality review is not deficient under constitutional standards). The cases appearing in the Appendix support our conclusion in that they show that a significant number of juries have been willing to impose death sentences in cases where a defendant has murdered more than one person and where, as in this case, there was no evidence of arbitrariness or other improper influences.

We note Tate's argument that his death sentences are disproportionate punishment in light of the fact that neither of his co-defendants have received death sentences. *See Gissendaner,* 272 Ga. at 717(19)(a), 532 S.E.2d 677 (noting that this Court's proportionality review includes an examination of the sentences received by any co-defendants). The evidence in Tate's sentencing trial showed that one co-defendant, Chad Tate, was merely fifteen years old at the time of the murders and, accordingly, that he was ineligible for

the death penalty. *See Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Walker v. State*, 282 Ga. 774(14), 653 S.E.2d 439 (2007) (noting in a proportionality review that the co-defendant was ineligible for a death sentence based on his having been adjudicated as being mentally retarded). The evidence in Tate's sentencing trial also showed that the second co-defendant, Dustin Tate, was neither the actual killer nor the primary driving force in the decision to kill the victims. Accordingly, we conclude that Nicholas Tate's death sentences are not excessive per se or substantially out of line, even in light of the fact that Dustin Tate, the only other adult present during the murders, has received a sentence less than death. *Gissendaner,* 272 Ga. at 718(19)(b), 532 S.E.2d 677 (weighing the relative culpabilities of co-defendants who each could reasonably have been argued to be more culpable than the other and finding no unlawful disproportionality).

Judgment affirmed.

All the Justices concur.

APPENDIX

Stinski v. State, 286 Ga. 839, 691 S.E.2d 854 (2010); *O'Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008); *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007); *Williams v. State*, 281 Ga. 87, 635 S.E.2d 146 (2006); *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005); *Riley v. State*, 278 Ga. 677, 604 S.E.2d 488 (2004); *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134

(2004); *Sealey v. State*, 277 Ga. 617, 593 S.E.2d 335 (2004); *Arevalo v. State*, 275 Ga. 392, 567 S.E.2d 303 (2002); *Raheem v. State*, 275 Ga. 87, 560 S.E.2d 680 (2002), disapproved on unrelated grounds by *Patel v. State*, 282 Ga. 412, 413(2) n. 2, 651 S.E.2d 55 (2007); *Lance v. State*, 275 Ga. 11, 560 S.E.2d 663 (2002); *Lucas v. State*, 274 Ga. 640, 555 S.E.2d 440 (2001); *Rhode v. State*, 274 Ga. 377, 552 S.E.2d 855 (2001); *Colwell v. State*, 273 Ga. 634, 544 S.E.2d 120 (2001); *Esposito v. State*, 273 Ga. 183, 538 S.E.2d 55 (2000); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000); *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000); *Pace v. State*, 271 Ga. 829, 524 S.E.2d 490 (1999); *Cook v. State*, 270 Ga. 820, 514 S.E.2d 657 (1999); *DeYoung v. State*, 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State*, 268 Ga. 623, 491 S.E.2d 791 (1997); *McMichen v. State*, 265 Ga. 598, 458 S.E.2d 833 (1995); *Ferrell v. State*, 261 Ga. 115, 401 S.E.2d 741 (1991).

[SEAL] SUPREME COURT OF GEORGIA
Case No. S10P0477

Atlanta, June 28, 2010

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

NICHOLAS CODY TATE v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk

This exhibit contains summaries of twenty-eight Georgia cases which resulted in the deaths of children. Each of these cases, which involve thirty defendants, resulted in sentences of less than death. In many, the state either never sought a death sentence or offered the defendant a lesser sentence if he plead guilty.

1. In 2003, Raymond Jenkins, a U.S. Customs and Border protection officer, shot and killed his girlfriend Guilene Marie Cherisme and her three-year-old daughter at his home in Henry County, then wrapped their bodies in plastic bags and drove them to Louisiana, where he dumped them in the woods. Jenkins was allowed to plead guilty in exchange for a sentence of LWOP. Harry R. Weber, *Grand jury to hear case of customs inspector accused in murders*, THE ASSOCIATED PRESS, July 22, 2003.

2. In 2003, Tamara Latrese (a.k.a. "Tamari") Lovett set fire to a house, killing her two children, Xzavier Lovett, 3, and Sareshia Lovett, 2. Lovett had previously lost custody of her children following accusations of abuse, but regained custody four months prior to killing them. She is serving two life sentences. *Mother is Charged in Toddler's Death*, AKRON BEACON-JOURNAL (Ohio), June 21, 2003.

3. On Thanksgiving Day 2002, Tony Hurst murdered Macon woman Sara "Von" Hawkins and her nine-year-old son, Christoper Willis. Hurst stabbed Hawkins thirty-seven times and slashed the little boy's throat. The state sought death, but the jury returned a sentence of

LWOP. Sharon E. Crawford and Nicholas Ledden, *Hurst avoids death sentence; Macon jury gives convicted killer life in prison,* MACON TELEGRAPH, Feb. 19, 2005.

4. In 2002, Michael A. Napper killed siblings Wayne DuJuan Carwise, 17, and Demetris Gray, 21, in Liberty County. Mr. Napper received two life sentences. *Brothers charged with killing another set of brothers*, AccessNorthGa.com, July 14, 2002, available at: http://new.accessnorthga.com/detail.php?n=192497&c=2.

5. In 2001, Willie Henry Lewis and two accomplices committed a series of armed robberies over a four-day period in 2001. Along the way, Lewis shot and killed Zavier Dinkins, 17, as he walked with a friend. A few hours later, Lewis shot and killed Kijuan Webb, 13, outside an Old Hapeville Road apartment. A Fulton County jury sentenced Lewis to life plus 140 years in prison.

6. In 2000, Andre Jerome Idlett killed his girlfriend, her lover and her three-year-old daughter. He was allowed to plead guilty in exchange for a sentence of LWOP. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

7. In 2000, Calvin Williams, a former Ludowici police officer, killed two women and two children in Bibb County. Williams shot his former girlfriend, 26-year-old girlfriend, Lisa Bymon, and stabbed her children Juwan, 5, and Desiree, 7, to death. Williams beat Bymon's friend, Ponda

Davis, 28, and stabbed her forty-six times. At trial, Williams received four consecutive sentences of LWOP. *Former Ludowici policeman indicted in slayings of four*, THE ASSOCIATED PRESS, Nov 16, 2000.

8. In 2000, Darrell Robert Ingram opened fire as 300 students left a dance at Beach High School in Savannah. Ingram killed Ramone Kimble, 16, and Stacy Smalls, 19. A Chatham County jury convicted him and sentenced him to two life terms plus thirty-five years. *National New Brief: Teenager Who Shot Girls Gets Maximum Sentence*, NEW YORK TIMES, Nov. 6, 2000.

9. In December of 1999, Issac Jerry Pearson committed what police described as the worst mass slaying in the history of Fayette County, shooting to death his sixteen-year-old girlfriend, Nikki Underwood, and three of her relatives who were visiting from Cincinatti [sic]: Donnie Gee, 60; Barbara Clark, 62; and Doeyana Maia Burton, who was just three years old. Pearson shot his victims to death while they slept. The state initially sought the death penalty, then withdrew it and allowed Pearson to plead guilty in exchange for a sentence of LWOP plus three life sentences. Staff and Wire Reports, *Law and Order*, ATLANTA JOURNAL-CONSTITUTION, Mar. 27, 2001.

10. In 1999, Cobb County man Anthony Joseph Zino, 48, a self-employed sales trainer, shot and killed his wife, Barbara in her sleep. He then shot and killed their 14-year-old daughter, Carolyn, as she fled down the hall clutching a

stuffed animal. He told police that he was facing financial ruin and "did not want to put [them] through that." The state initially sought death, but ultimately allowed Zino to plead guilty in exchange for two life sentences. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

11. In 1999, Kenneth Rayshun Beamon shot and stabbed to death his girlfriend's aunt, 32-year-old Teresa Shoemaker, and her two sons, 14-year-old Lamar Shoemaker and 12-year-old Robert Shoemaker. Charles Shoemaker – Mrs. Shoemaker's husband and the boys' father – had asked Beamon and his girlfriend to move out of the Shoemakers' house. Mr. Shoemaker was also shot, but survived. The Fulton County District Attorney allowed Mr. Shoemaker to enter into a plea bargain in exchange for a life sentence.

12. In 1999, Wesley Harris committed the "execution-style" shooting and murder of Whitney Land, 22, and her 2-year-old daughter on the side of a Lawrenceville road. He then burned their bodies. The Gwinnett County District Attorney sought death, but Harris received a sentence of LWOP. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

13. In 1998, Narciso Pascaio Pineda, Sr., shot and killed 42-year-old Mario Molina, 42-year-old Leonel Vazquez,, 41-year-old Prisca Vazquez, and her unborn child. The state sought death, but a Columbia County jury gave him three

sentences of LWOP for the murder of the adults and another life sentence with the possibility of parole for the murder of Ms. Vazquez's child. *Across the Area: Pineda Sentenced to Four Life Terms*, AUGUSTA CHRONICLE, Oct. 22, 1999.

14. In 1998, Victorino Fitz, a leader of the Latin Kings gang, ordered the murders of 17-year-old Manuel Martinez, 27-year-old Darrell Gibbs, and 26-year-old Darreul "Little D" Johnson. Two of the bodies were found wrapped in black plastic, one in a creek in Vinings and the other beside the Chattahoochee River. The third body was found near the pool of an apartment complex next to Fitz's home. A Polaroid picture of Fitz was tucked under one of the bodies. After a jury trial in Fulton County, Fitz was sentenced to life in prison. Fitz was sentenced to life in prison. *'Garbage bag' sentence stiff; Killings linked to drug turf war*, ATLANTA JOURNAL-CONSTITUTION, August 28, 1999.

15. In 1998, after Carl Bernard Mickens's estranged girlfriend terminated her pregnancy, he burned down her mobile home, killing her brother, Roderick Green, and his three-year-old son, Roderick Green, Jr. A Dougherty County jury found him guilty of two counts of felony murder, arson, burglary; and terroristic threats, and sentenced him to consecutive life terms. *Mickens v. State*, 277 Ga. 627, 593 S.E.2d 350 (2004).

16. In 1997, Reginald Acres viciously stabbed and killed his wife, his eight-month-old daughter (whose throat he slashed as she lay in her crib), and his wife's 18-year-old cousin, who was nine

months pregnant. He also slashed the throat of his twelve-year-old stepdaughter, who survived by playing dead. He then drove home, showered, and went to work. After the Bibb County District Attorney allowed Acres to plead guilty, he received a sentence of life imprisonment without possibility of parole (LWOP). Bill Rankin, et al., *A Matter of Life or Death (Day One): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 24, 2007; see also interactive online feature "Life or Death: What Was the Verdict?", available at http://www.ajc.com/metro/content/metro/deathpenalty/partone.html.

17. In 1997, Rodney McWhorter shot and killed Lakeshia Gordon, 15, and Stanley Jarrells, 25, while robbing an Elberton motel. An Elbert County jury sentenced McWhorter to two consecutive life terms. *Man gets two life terms*, AUGUSTA CHRONICLE, June 21, 1997; *Man convicted in 2 murders*, ATLANTA JOURNAL-CONSTITUTION, June 22, 1997.

18. In 1996, William James Henderson shot and killed his two former step-children – Edward Body, 16, and Sabrina Alford, 13 – as they slept in their beds. He was allowed to enter a plea bargain and received two life sentences. Bill Torpy, *Former stepfather charged in deaths*, ATLANTA JOURNAL-CONSTITUTION, Nov. 12, 1996.

19. In 1994, Kimjon Ingram, a lieutenant in the gang known as "FOLKS" (or "Followers of Our Lord Satan"), and Christopher Wolfe firebombed a Mechanicsville apartment in 1994 to settle a dispute involving a gang member's sister, killing

infant sisters Dynisha Henderson, 21-months-old, and Lexious Henderson, six weeks old. After the firebomb was tossed, Wolfe was heard to say "Them crabs gonna burn." The state sought death against Ingram, but his judge sentenced him to LWOP. After a jury trial, Wolfe received a life sentence. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

20. In 1994, Dudley Hughes III shot Charles Barney, 20, and Fareedah Dukes, 16, in the head execution-style after breaking into their home. The state initially sought death, but allowed Hughes to enter into a plea bargain. He received a sentence of LWOP. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

21. In 1994, James Ringo McDaniel lived with his ten-year-old brother, Justin Davis, in the Butts County home of their grandparents, seventy-six-year-old Eugene Barkley and seventy-year-old Emma Barkley. One night, McDaniel used crack cocaine, then took a gun from his grandfather's bedroom and shot his grandparents and brother in the head, killing them. He then took his grandfather's wallet and went to buy more crack, which he smoked on the front porch before calling 911 and pretending that he had discovered the bodies of his family. Mr. McDaniel entered a guilty plea in exchange for a sentencing trial before the judge, who had improperly inserted himself into the plea discussions and said that he was 90 percent likely to impose a

life sentence. After the Supreme Court of Georgia overturned his convictions on this ground, Mr. McDaniel was sentenced to LWOP. *McDaniel v. State*, 271 Ga. 552, 522 S.E.2.d 648 (1999).

22. In 1994, Victor Biggs forced his way into the DeKalb County apartment of Ebony Cameron, 19, and shot her to death. Ms. Cameron's unborn son was delivered by emergency surgery, but died shortly after birth. A DeKalb County jury sentenced Biggs to two terms of life in prison and consecutive sentences of twenty and five years. *Biggs v. State*, 281 Ga. 627, 642 S.E.2d 74 (2007).

23. In 1994, Eugenio Cadavillo Quijano shot and killed Amanda Puckett, a 16-year-old clerk who was working alone in her mother's Cobb County jewelry store. Quijano fled to Mexico, then to Seattle, and back to Atlanta before he was arrested. The state did not seek death, and Quijano's jury gave him a life sentence. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

24. In 1993, Robert Aaron Floyd and Rudolph Ottis slit the throats of half-sisters Bridgett Lee, 15, and Britney Ikharia, 7, killing both, while robbing their mother's apartment. The assailants killed the girls because they could identify Ottis's sister as one of the robbers. Prosecutors dropped the death penalty against Floyd after a jury convicted him of killing only one of the girls; he received a sentence of LWOP. Ottis was convicted of both murders, and was given a life

sentence. Floyd had a jury trial, and was given LWOP (death sought). Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007.

25. In 1993, Carl Harris, a 57-year-old sanitation worker in Brunswick, Georgia, killed two women and a two-month-old baby boy. The nude and disemboweled body of Cheryl Lewrisey Coleman, 33, was found on the bank of Academy Creek along with the baby carrier for her two-month-old son, Jamar'ee. Jamar'ee's body was never found. The partially-clothed body of Essie Marie Dowdy, 52, was found in a ditch leading to Academy Creek; the trauma to her body showed that she died from a powerful blow or blows to her body, possibly from being run over by a vehicle. Harris was also charged with two counts of aggravated assault for trying to strangle another Brunswick woman with a rope. He was also a suspect in the murders of two other women in 1993. Harris was allowed to enter a plea bargain in exchange for a sentence of LWOP. Tab(s): Jingle Davis, *Death penalty sought in Brunswick murder case*, ATLANTA JOURNAL-CONSTITUTION, Nov. 9, 1994.

26. In 1992, Bradford Lee Bagley strangled and murdered his eight- and nine-year-old daughters while they were visiting him over the Christmas and New Year's holiday. Family members who came to his house in response to his threats to kill his estranged wife found the two girls dead in a back room. Mr. Bagley entered a plea and received a life sentence. Holly

Morris, *State News: Crime*, ATLANTA JOURNAL-CONSTITUTION, Feb. 5, 1992.

27. In 1992, Ronald Lupez Freeman shot and killed three people in three different Cobb County robberies: Rakesh Patel, a 25-year-old newly married convenience store owner; Terri Waddell, a "Circle K" convenience store clerk, whom he shot in front of her four-year-old daughter; and Charles "Chet" Planchard III, a sixteen-year-old Burger King employee whom he shot after placing an order for a hamburger and french fries. He was also convicted of shooting three people at a Marietta apartment complex that same year. Freeman was tried separately for each murder and received a life sentence in each trial. Bill Rankin, et al., *A Matter of Life or Death (Day Two): An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007; Staff Reports, *Metro in Brief: Appeal Delays Freeman Murder Trial*, ATLANTA JOURNAL-CONSTITUTION, Sep. 25, 2007; Don Plummer, *Child, 5, Testifies Against Man Linked to Mother's Death; Suspect Also Tied to 2 Other Murders*, ATLANTA JOURNAL-CONSTITUTION, June 5, 1993; Don Plummer, *Jury Deciding Fate of Man Accused of Killing Store Owner Judge Orders Evidence in 2 Other Murder Cases Considered*, ATLANTA JOURNAL-CONSTITUTION, June 11, 1993; Don Plummer, *Freeman found guilty in Cobb slaying Death penalty testimony today*, ATLANTA JOURNAL-CONSTITUTION, June 12, 1993; Don Plummer, *Metropolitan Public Safety Report: Trial to Start in Slaying Witnessed by 4-year-old*, ATLANTA JOURNAL-CONSTITUTION, May 9, 1994; Don Plummer, *Cobb man guilty in '92 killing;*

Life Sentence Is 3rd Resulting from Crime Spree, ATLANTA JOURNAL-CONSTITUTION, May 29, 1994.

28. In 1989, Sheldon Antoine Sermons shot and stabbed to death his employer Mark Boyd, killing him. Sermons then chased down Mr. Boyd's five-year-old daughter, Alexis, and stabbed her to death. The state sought death, but a Richmond County jury returned a sentence of LWOP. Bill Sanders, *Sermons gets life term, and wins*, AUGUSTA CHRONICLE, Jul. 15, 1993.